

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ITV DIRECT, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	
HEALTHY SOLUTIONS, L.L.C., et al.,)	
)	
Defendants.)	
)	Civil Action No. 04-CV-10421-JLT
CAPPSEALS, INC.,)	
)	
Plaintiff-in-Intervention,)	
)	
v.)	
)	
HEALTHY SOLUTIONS, L.L.C., d/b/a)	
DIRECT BUSINESS CONCEPTS; ITV)	
DIRECT, INC.; and DIRECT)	
FULFILLMENT, LLC,)	
)	
Intervenor-Defendants.)	

PLAINTIFF-IN-INTERVENTION'S CONCISE STATEMENT OF MATERIAL FACTS

Plaintiff-in-Intervention Cappseals, Inc. ("Cappseals"), through counsel and pursuant to Local Rule 56.1, submits the following concise statement of material facts in support of its motion for partial summary judgment:

1. In or around August 2003, defendant Healthy Solutions, LLC, d/b/a Direct Business Concepts (hereinafter "DBC"), a California limited liability company, began issuing purchase orders to Cappseals, a Washington corporation, on a weekly or near weekly basis requesting that Cappseals manufacture and bottle certain quantities of a product known as Supreme Greens with MSM (hereinafter "Supreme Greens") for \$2.95 per bottle. Anderson Aff., ¶ 2. A true and correct copy of an example DBC purchase order, dated September 22,

2003, is attached as Exhibit A to the Affidavit of Harry A. Anderson III, filed herewith as Exhibit 1.

2. On or about November 11, 2003, DBC issued a standing purchase order to Cappseals requesting that Cappseals manufacture 50,000 bottles of Supreme Greens per week for shipment to Direct Fulfillment, LLC, (hereinafter "Direct Fulfillment") in Beverly, Massachusetts, an affiliate of DBC's distributor ITV Direct, Inc., (hereinafter "ITV") a Massachusetts corporation (Direct Fulfillment and ITV are collectively referred to herein as "ITV Direct"). Anderson Aff., ¶ 3. A true and correct copy of this standing purchase order, dated November 25, 2003, is attached as Exhibit B to the Affidavit of Harry A. Anderson III.

3. Between December 29, 2003, and February 5, 2004, Cappseals made six weekly shipments to ITV Direct containing a total of approximately 303,644 bottles of Supreme Greens. Anderson Aff. ¶ 4. True and correct copies of packing slips and bills of lading evidencing the shipment of these goods to ITV Direct are attached as Exhibit C to the Affidavit of Harry A. Anderson III.

4. DBC owes Cappseals approximately \$890,182.09 for the 303,644 bottles of Supreme Greens shipped to ITV Direct between December 29, 2003, and February 5, 2004. Anderson Aff., ¶ 5. A true and correct copy of DBC's account statement with Cappseals is attached as Exhibit D to the Affidavit of Harry A. Anderson III, filed herewith. The entire sum of \$890,182.09 owed by DBC to Cappseals for these goods is past due and remains unpaid. DBC has acknowledged to Cappseals that it has an outstanding balance on its account in the amount of \$890,182.09, but asserts that it is without resources to pay this sum because of ITV Direct's refusal to pay DBC for these same goods. Anderson Aff., ¶ 5.

5. For each of the six weekly shipments of Supreme Greens to ITV Direct by Cappseals described in paragraph 3 above, DBC issued an invoice to ITV Direct expressly noting the specific date and quantity of goods shipped to ITV Direct by Cappseals. Pursuant to these six invoices, the total amount due and owing to DBC by ITV Direct for the 303,644 bottles of Supreme Greens goods shipped by Cappseals is \$1,821,864. True and correct copies of the invoices issued by DBC to ITV Direct are attached as Exhibit E to the Counterclaim(s) filed in this matter by DBC and its affiliates on or about April 19, 2004.

6. Neither DBC nor ITV Direct has ever notified Cappseals of any non-conformity relating to the 303,644 bottles of Supreme Greens shipped to ITV Direct. Anderson Aff., ¶ 6.

7. No pleading or affidavit filed in this action contains any assertion of non-conformity relating to the 303,644 bottles of Supreme Greens shipped to ITV Direct by Cappseals.

8. ITV Direct has admittedly refused to pay for the 303,644 bottles of Supreme Greens shipped to it by Cappseals for reasons unrelated to the goods themselves. Plaintiff's Opposition to Defendant's Motion for a Temporary Restraining Order, p. 8 ("Based on the Defendants' fraudulent representations, indemnification obligations, failure to account to ITV for Internet sales, breaches of contract and other acts, ITV has refused to pay Healthy Solutions under the Distribution Agreement, and filed this action.").

Respectfully submitted,
CAPPSEALS, INC.
By its attorney,

/s/ Daniel J. Kelly

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